United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-1207

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P/S

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

Docket No. 74 - 1207

UNITED STATES OF AMERICA,

Appellee,

-against-

JOHN DURKIN,

Defendant-Appellant.

APPEAL FROM A JUDGMENT OF CONVICTION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR DEFENDANT-APPELLANT

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ISSUES PRESENTED

1. Whether there was insufficient probable cause to support the arrest of appellant in that the informant was of unproven reliability and the information provided by him was insifficient to indicate criminal activity on the part of appellant; so as to justify the arrest.

2. Whether even if the arrest of appellant was legal, the subsequent warrantless search of a suitcase seized by the agents did not fall within the various exceptions as to the Fourth Amendment allowing such a search as there was sufficient time to secure a warrant and neither appellant or Charles Murray were in a position to reach into the case to seize a weapon or destroy evidence.

STATEMENT PURSUANT TO RULE 28(9)(3)

A. Preliminary Statement

This is an appeal from a judgment of sentence rendered against appellant in the United States District Court for the Southern District of New York (Pollack, J.), on January 17, 1974, sentencing appellant to three (3) months imprisonment, with a probation of two (2) years to follow, for conspiracy to possess and possession with intent to distribute marihuana in violation of 21 U.S.C. sections 812, 841 (a)(1)(b)(1)(B) 846.

B. Statement of Facts

In an indictment filed October 1, 1973, appellant was charged with conspiracy to violate the laws against the possession of marihuana (hashish) with an intent to distribute same, and possession of that substance under 21 U.S.C. sections 812, 841 (a)(1)(b)(B), 846. The indictment charged the criminal activity took place on August 14, 1973 charging the involvement of one Charles Murray as an indicted co-conspirator. On November 26, 1973, a Motion to Suppress Evidence was denied and appellant entered a plea of guilty pursuant to an agreement with the United States Attorney that appellants appellate rights would be preserved as to the Motion to Suppress Evidence.

STATEMENT OF THE CASE

Jeffrey Hall, an agent of the United States Drug Enforcement Administration testified that John Durkin, appellant herein was arrested on August 14, 1973, while a passenger in an automobile, owned and operated by Charles Murray (10)*. Appellant had been observed leaving Pennsylvania Station at approximately 8:40 p.m. carrying a suitcase (later described as a leather duffel or shoulder bag; 31-33) and a guitar case. Agent Hall was surveilling the scene and observed Durkin get into the Volkswagen automobile of Charles Murray. The vehicle stopped several blocks away, appellant and Murray were arrested at which point Agent Cremin took the suitcase into custody, opened it, seizing drugs and money (10). At the time the suitcase was removed from the Murray vehicle and opened, the agents had no warrant for either arrest or search (21), and the defendants were at that time physically restrained by handcuffs and seated in the rear of a government vehicle (37,38). It is undisputed that appellant was handcuffed in the government vehicle at the time the search took place (39). The search took place outside of the car on the highway (38,39).

As the basis for the arrest, the government presented testimony regarding information from a paid informant, Daniel Miller, who was also called as a government witness. Agent Hall testified that he had been given information by informant on seven

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*10 All references are to the Notes of Testimony of a hearing on Appellant's Motion to Suppress Evidence held on November 26, 1973

or eight occasions prior to the arrest, and the information provided being accurate after it was checked out. The type of information provided was not indicated, although Agent Hall stated that he had only been involved in one previous narcotics case with the informant (4-5). He later admitted that he had only arrested one person as a result of the informant's information (16), although this is at variance with Exhibit "C", which is a note made by the U.S. Attorney regarding the reliability of the informant prior to the arrest of Appellant. This was admitted by stipulation (76-77). This is also at variance with the statement in the Complaint admitted as Exhibit "B", which stated that the informant's reliability had"been demonstrated on a number of prior occasions...".

Daniel Miller, informant had been arrested in Florida on August 1, 1973, (56) charged with possession of in excess of one pound of cocain (54). Subsequent to this, in an attempt to secure favorable treatment in this case, he became an informant (30,72). The informant in fact did not know the charges against him in Florida (54), and as of November 26, 1974, had not even been informed that he was indicted (70). He, in fact, was flown to New York from Florida in the company of a Federal Agent who introduced the informant to Mr. Hall (71).

According to Hall, there were four defendants involved in the informant's first case, although only one had been arrested

(28), but according to the informant only one person was involved in that case (73). The individual arrested in the prior case was the individual with whom the informant was involved at the time of his arrest for possession of cocaine (74)*. This provided the basis for the government's assertion of reliability.

On August 14, 1973, the day of the arrest, the informant advised Agent Hall that he had arranged to buy one-hundred pounds of hashish from "Charlie", describing that individual, his automobile, including the license number, and his telephone number (5-7). This information was checked out by other agents who saw Charles Murray at the residence of the informant at the time the informatn indicated he would be there (7-8). The informant called Agent Hall on the telephone, advising him that he had been told by Murray that his connection was arriving in town at 8:30 p.m. and that "Murray was going to pick him up at the train station and then was going to contact the informant and make final plans on his delivery." (8) The informant was to provide the agent with more specific information regarding the delivery of the drugs, and in fact, did indicate that a transfer was going to take place at a Holiday Inn, (26-27) but no other detail was given regarding the meeting at the train station (31), and no description was given of the individual who was meeting Murray in the evening. (36)

At no time subsequent to the receipt of the information did Agent Hall attempt to secure an arrest or search warrant,

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*The informant claimed that 500 grams (one pound) were seized (54) the government asserted 40 kilos (28).

although he was in his office all afternoon and he was a twenty minute drive from the United States Courthouse at Foley Square (32-33). There was, in fact, a duty magistrate available at all times to issue a warrant. (33-34)

According to Agent Hall he and "several other agents went to the Penn Station, the train station, in an attempt to locate Murray's car." The Complaint against appellant indicates that the informant indicated the connection was arriving at Pennsylvania Station, and that a surveillance observed Murray driving to the station. The informant testified that he was not told my Murray at what station he was meeting his connection (62,63). Although Agent Hall asked Miller to ascertain what station it was, he could not do so and so informed Agent Hall, never telling him that the meeting was taking place at Pennsylvania Station (64-65). In fact, the informant testified that the pickup at the station was to be at 8:00 o'clock (50,63) not 8:30 p.m. Although Miller testified that Murray's friend was bringing the hashish to town (50), he never stated that he told this to Agent Hall, and in fact, stated that he assumed the marihuana was in New York City at 4:00 p.m. when he received a sample from Murray (67-68). Agent Hall made no mention of the fact that the hashish was being brought to the city by the connection in either direct or cross-examination.

When appellant was first seen carrying the suitcases, Agent Hall felt that the guitar case and suitcase were capable of

carrying one hundred pounds of hashish, (22-23), but could not make the determination as to whether appellant was straining as if carrying this weight. However, Hall stated that when he picked up the suitcase it weighed approximately twelve pounds and the guitar case weighed approximately five pounds (38-40).

ARGUMENT

POINT I

THE WARRANTLESS ARREST OF APPELLANT WAS WITHOUT PROBABLE CAUSE, BASED ON HEARSAY TESTIMONY FROM A SOURCE OF UNPROVEN RELIABILITY

A. The Informant Was Of Unproven Reliability And Did Not Provide Sufficient Information To Indicate That Criminal Activity Was Taking Place.

Hearsay testimony of an informant may be used as probable cause for an arrest so long as the informant himself is credible so as to allow this information to be believed, and the information itself is sufficiently detailed so as to indicate that it is, in fact, reliable. Aguilar v. Texas, 378 U.S. 108, 84 Supreme Ct. 1509 (1964); Draper v. U.S., 358 U.S. 307, 79 Supreme Ct. 329 (1959).

The informant in this case, Daniel Miller, was an individual who had recently been arrested and, in an attempt to secure a favorable disposition of his case, became a registered informant with the Drug Enforcement Administration. In order to substantiate his credibility, the government advanced the proposition that he had given successful information in numerous previous cases. However, it was determined that the only positive information resulting in arrest involved the informant's own companion in illegal activity. He had only been informing for approximately two weeks, and the case at bar was, in fact, the first arrest as a result of

his independent information, and although the government attempted to avoid this by vague allegations of previous reliability, they were unable to point to any articulable information resulting in arrests. When such is the case, the information provided by the informant must be of sufficient detail so as to indicate that he is, in fact, truthful and his information is, in fact, reliable. Spinelli v. U.S., 393 U.S. 410, 89 Supreme Ct. 584 (1969).

The informant did indicate that Charles Murray was planning to sell him hashish. He described Murray's automobile, gave his telephone number and, in fact, met with Murray. All of these factors are completely innocent acts concerning information which would be available to anyone knowing Murray, and it is interesting to note that the one corroborative act on the part of Murray, the giving of the sample of the hashish to the informant was never mentioned by Agent Hall, although the informant notified him of this fact (60). Amazingly, the only physical evidence which would link Murray to criminal activity was flushed down the toilet (60), which fact was never disclosed to Agent Hall by his reliable informant (61-62).

Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329 (1959) sets the standards for a warrantless arrest under circumstances such are present in the instant case.

The description of the man who was meeting Murray at the station was not given by the informant, who in fact did not know at what station the meeting was to take place. Hall was never advised that the drugs would be there. There was insufficient probable cause to allow the agents to move in and arrest Murray and Durkin without

something
/more than the information then in the possession of the agents. Had the arrest taken place at the hotel, with information indicating that the transaction was about to take place, this argument could not be made, as there would have been sufficient reason to believe that illegal conduct was taking place.

Draper holds that the facts in the possession of the officer must be sufficient to give rise to a belief that a violation of the law was then and there taking place. At 358 U.S. 313, 79 Supreme Ct. 333, it is stated "probable cause exists where the facts and circumstances within their (the arresting officers') knowledge and of which they had reasonable trustworthy information (are) sufficient in themselves to warn a man of reasonable caution in the belief that an offense has been or is being committed."

The mere meeting of individuals at a train station, with no description or other indication of what is taking place does not satisfy this standard. It is submitted that under the circumstances of this case, with an informant of questionable reliability, more fully detailed information was required, especially when the station was not named, the "connection" was not identified or described, and the informant himself indicated that the illegal transaction was going to occur at a later time and at a different place, and the agent did not state that he expected drugs to be present at that time, the informant himself claiming the drugs from which he had already been given a sample were already in the city. Durkin arrived at 8:40, forty minutes after the time

mentioned by the informant. With no description of the connection, no detail as to which station, and a time variance of almost one hour, the facts do not bring the instant case within the rule of Draper.

POINT II

THERE WAS NO JUSTIFICATION FOR THE WARRANTLESS SEARCH OF THE SUITCASE SEIZED FROM THE AUTOMOBILE AFTER APPELLANT WAS PHYSICALLY RESTRAINED BY HANDCUFFS AND PLACED IN THE REAR OF THE GOVERNMENT VEHICLE.

The constitutional mandate requiring the warrant before a search is subject to certain exceptions. One of these is a search incident to an arrest. The authoritative statements concerning the constitutionally permissible scope of a warrantless search incident to a lawful arrest is contained in Chimel v. California, 395 U.S. 752, 89 Supreme Ct. Reporter 2034 (1969). In Chimel, the Court stated that'

> "when an arrest is made it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the later might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be in danger, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for an seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course be governed by a like rule. .... there is ample justification, therefore, for a search of arrestee's person and the area "within his immediate control" - construing that phrase to mean the area from within which he might gain possession of a weapon or destructible

evidence".

The burden of demonstrating the availablity of an exception to the warrant requirement really is on the government, who is seeking to make valid the warrantless search. Coolidge v. New Hampshire,403 U.S. 443, 91 S.Ct. 2022 (1971)

The factual situation in this case is somewhat like that of Draper v. U.S., 358 U.S. 307, 79 S.Ct. 329 (1959), although Draper gave more compelling reasons for the warrantless search, and the search of Draper was of the person as opposed to the search of the suitcase as herein. In Draper, the Supreme Court held that with a warrantless arrest supported by probable cause in the nature of exactly descriptive facts, a warrantless search incident thereto was proper in that every bit of the informant's information had been verified. Of course, under the doctrine of Chimel, a search of the person is valid as merely being incident to the lawful arrest.

This case is not ruled by U.S. v. Robinson, U.S. , 14 Cr.L. 3043 (No. 72-936, 1973) or Gustofson v. Fla., U.S. , 14 Cr.L. 3056 (No. 71-1669, 1973) which concern the search of the person, nor Chambers v. Maroney, 395 U.S. 42, 90 S.Ct. 1975 (1970), which makes the definitive statement regarding the search of the vehicle incident to an arrest of its occupants. In Chambers, the Court extended the principle of Carroll v. U.S., 267 U.S. 132, 45 S.Ct. 280 (1925) which allowed a warrantless search of an automobile with probable cause in view of the fact that a vehicle was

easily movable. The Court in Chambers felt that merely incident to a lawful arrest, a vehicle may be searched without a warrant so long as there is probable cause to arrest because the vhicle could be easily moved.

The rule of Chambers does not cover appellant. In the case at bar, the search was of the suitcase. They were connected with appellant, not the vehicle. The suitcase were in the physical control of the agents while appellant was handcuffed in the rear seat of the government vehicle. To say that appellant was in a position to exit the vehicle, open the suitcase and gain possession of the items inside while handcuffed, under the physical control of an agent other than the one who had the bag is to attribute appellant with super-human qualities.

This case is not covered by the rule of U.S. v. Riggs, 474 F2d 639 (1973) 2nd Cir. 1973). The case at bar is on all fours with a series of Fifth Circuit cases; U.S. v. Soriano, 482 F2d 469 (1973); U.S. V. Garay, 477 F2d 1306 (1972); U.S. v. Colbert, 454 F2d 801 (1972)(reversed on grounds of abandonment and of standing, 474 F2d 174 (1973), all concerned searches of suitcases in the possession of government agents, the defendants in each instance being in no position to gain control over the suitcase. In Colbert, the defendants were in a patrol car, although they were apparently not handcuffed as one of them was able to withdraw a number of shotgun shells from his pocket and throw them on the ground.

Although the arrest of appellant took place while he was a

passenger in an automobile, the search does not thereby become vehicular. Initially ,the arrest could have been made when he entered the car, but more important is the fact that the search itself was not of a vehicle, but of bags contained therein. It was obvious to the agent that the bag had no connection with the vehicle in that they were in the possession of appellant when he exited Penn Station.

To allow a search of the suitcase merely because appellant changed his status from pedestrian to passenger and the immobile suitcase was now in the car, would allow the police to wait for this set of circumstances to occur in order to side-step the Constitutional Mandate of the Fourth Amendment.

U.S. v. Van Leeuwen, 397 U.S. 249, 90 S.Ct. 1029 (1970) gives the government the right to take the suitcases into their possession and detain themwhile a search and seizure warrant was obtained. This could have easily been done in the case at bar, as there was a duty magistrate available at all hours and it would have been a minor inconvenience at best for the agents to have secured a warrant. Such an inconvenience should not operate as a bar to the constitutional rights of appellant. Had there been probable cause for a warrant, there would have been no problem with the search. However, had a warrant been issued without probable cause, the search would not stand. The exoeption to the warrant requirement is as delineated in Chimel, and should not be extended to allow the necessity for a warrant to be disposed of in every

warrantless arrest situation issue of this nature. To allow the search merely because this was an arrest would do away with the need for probable cause in all cases where there is an arrest, which is certainly not the rule of Chimel, Robinson or Gustafson.

If in fact, the agents were expecting to find one hundred pounds of hashish in the suitcase and guitar case, that notion was certainly dispelled when they were first picked up and found to weigh no more than a total of seventeen pounds. Under the doctrine of verification expounded by Draper, the crucial element in the instant case was not verified. Certainly the search of appellant for a locker key would be justified, but when the bags in his possession have a gross weight of eighty three pounds less than was expected, this at the very least, without even reaching the issue of control over the bags should mandate a warrant. The time involved to secure a warrant would have thwarted no governmental plans in relation to this case, as there would be no further police action as the meeting at the Holiday Inn had been cancelled by the arrest.

As the immobile suitcase was beyond the reach of the appellant and in the control of the agents, the independent magistrate should have been interposed between the arrest and search, as there was no threat of weapons or other potentially dangerous items as in U.S. v. Johnson, 467 F2d (1972) 2nd Cir.); U.S. v. Green F2d (1973, 5th Cir.)

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CONCLUSION

For all the above stated reasons, the evidence should be suppressed, the conviction reveresed and the case returned to the Court below for a new trial.

Respectfully submitted,

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